STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL MCGEE,

Plaintiff/Counterdefendant,

v

CITY OF WARREN,

Defendant/Counterplaintiff/Cross-Plaintiff-Appellant,

and

TONY ANTHONY, INC.,

Defendant/Cross-Defendant-Appellee,

and

ANDREW ECKSTEIN, MAJOR CEMENT COMPANY, INC., and ANDERSON, ECKSTEIN & WESTRICK, INC.,

Defendants.

UNPUBLISHED
April 26, 2012

No. 296452
Macomb Circuit Court
LC No. 2008-002139-NO

ON REMAND

Before: SAAD, P.J., and JANSEN and K. F. KELLY, JJ.

PER CURIAM.

Our Supreme Court vacated that portion of this Court's judgment in *McGee v City of Warren*, unpublished per curiam opinion of the Court of Appeals, issued May 24, 2011 (Docket No. 296452), that affirmed the trial court's grant of summary disposition in favor of defendant Tony Anthony, Inc., on defendant City of Warren's cross-claims for breach of contract and indemnification, and remanded this case for further proceedings. On remand, we reverse the trial court's decision and remand for further proceedings.

Plaintiff Michael McGee filed suit alleging that on June 11, 2007, he tripped and fell on a sidewalk within the jurisdiction of the City. Plaintiff maintained that he fell because of a height differential between two adjacent sidewalk slabs, that the sidewalk was dangerous and defective, and that the City failed to properly maintain the area or to warn of the defective condition. Plaintiff also alleged that defendants Major Cement Company and Tony Anthony, Inc., negligently performed sidewalk construction and repair during the course of a water main replacement project, and that he was injured as a result of that negligence.

Plaintiff settled with the City, and plaintiff's claims against other defendants were dismissed via summary disposition.

The City filed a cross-complaint[1] against Anthony on September 26, 2008, alleging breach of contract and indemnity. Count I alleged that the replaced sidewalk sank and created a height differential, and asserted that Anthony breached its contract with the City by failing to perform its duties in a workmanlike manner and to indemnify the City. Count II alleged that Anthony had failed to assume the costs of the City's defense in the suit filed by plaintiff and to hold the City harmless.

Anthony moved for summary disposition of the City's cross-claims. Anthony alleged that it removed the slab at the spot where plaintiff fell on August 7, 2002, and installed a valve and filled the hole pursuant to project specifications. Anthony asserted that the City's breach of contract claim was barred by the six-year statute of limitations for contract actions, MCL 600.5807(8), because it was filed more than six years after August 7, 2002, the date on which any breach would have occurred. In addition, Anthony asserted that the statute of repose, MCL 600.5839(1), also applied to the case. At all pertinent times MCL 600.5839(1)[2] read:

> No person may maintain any action to recover damages for any injury to property, real or personal, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, nor any action for contribution or indemnity for damages sustained as a result of such injury, against any state licensed architect or professional engineer performing or furnishing the design or supervision of construction of the improvement, or against any contractor making the improvement, more than 6 years after the time of occupancy of the completed improvement, use, or acceptance of the improvement, or 1 year after the defect is discovered or should have been discovered, provided that the defect constitutes the proximate cause of the injury or damage for which the action is brought and is the result of gross negligence on the part of the contractor or licensed architect or professional engineer. However, no action shall be maintained more than 10 years after the time of occupancy of the completed improvement, use, or acceptance of the improvement.

[1] The complaint was also labeled a countercomplaint but made no allegations against plaintiff.

[2] MCL 600.5839 was amended and restructured by 2011 PA 162, effective January 1, 2012.

Anthony asserted that the City's cross-complaint was filed more than six years after August 15, 2002, the date of acceptance or use of the improvement, i.e., the sidewalk, and therefore was barred.

The City moved for summary disposition of its cross-claims. The City argued that Anthony breached the contract because it improperly compacted the soil beneath the replaced slab or caused the slab to sink so that it was lower than the adjacent slab. The City argued that it was entitled to summary disposition on Count II, indemnification, because Anthony agreed in the contract, the performance bond, and the maintenance and guaranty bond to indemnify and hold the City harmless from any and all claims related to its performance on the project.

The trial court denied the City's motion and granted Anthony's motion. The trial court found that the City accepted Anthony's work on the project on August 15, 2002, and that this date began the running of the statute of repose. The court also found that Anthony's work as a contractor constituted an improvement to real property. The court determined that because the City did not file its cross-complaint until September 26, 2008, it was barred by the statute of repose.

On appeal this Court, relying on *Miller-Davis Co v Ahrens Constr*, 285 Mich App 289, 307; 777 NW2d 437 (2009),[3] held that the statute of repose applied to claims for breach of contract and barred the City's cross-claims against Anthony. *McGee*, unpub op at 2-4.

The City sought leave to appeal to our Supreme Court; in lieu of granting the application, our Supreme Court entered the following order:

> On order of the Court, the application for leave to appeal the May 24, 2011 judgment of the Court of Appeals is considered and, pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we VACATE in part the judgment of the Court of Appeals and we REMAND this case to the Court of Appeals to apply MCL 600.5807(8) to the City of Warren's claims for breach of contract (insofar as they do not seek indemnity for damages sustained as a result of tortious injury) and, if necessary, for consideration of the remaining issues raised in the appeal. MCL 600.5839(1) bars any action against a contractor seeking indemnity for damages resulting from bodily injury arising out of a defective and unsafe condition of an improvement to real property. *Miller-Davis v Ahrens Construction, Inc*, 489 Mich 355 (2011). However, the statute of repose does not apply to non-indemnity actions for breach of contract.

We review a trial court's decision on a motion for summary disposition de novo. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001).

[3] This decision was reversed by *Miller-Davis v Ahrens Constr, Inc*, 489 Mich 355; 802 NW2d 33 (2011).

The statute of limitations for an action based on breach of contract is six years. MCL 600.5807(8). The statute of limitations for a breach of contract action begins to run when the claim may be brought, which is generally on the date the breach occurs. *Seyburn, Kahn, Ginn, Bess, Deitch & Serlin v Bakshi*, 483 Mich 345, 355; 771 NW2d 411 (2009). In *Employers Mut Cas Co v Petroleum Equip, Inc*, 190 Mich App 57, 63; 475 NW2d 418 (1991), this Court stated that "[a] cause of action for breach of a construction contract accrues at the time work on the contract is completed."

We hold that the trial court erred by dismissing the City's cross-complaint, and remand this matter to the trial court for consideration of the City's claims. The trial court dismissed the City's entire cross-complaint on the ground that it was barred by MCL 600.5839(1). However, the statute of repose "does not apply to actions for breach of contract." *Miller-Davis v Ahrens Constr, Inc*, 489 Mich 355, 358; 802 NW2d 33 (2011). We conclude that at a minimum, an issue of fact existed as to when the City's claim for breach of contract accrued, and thus when the statute of limitations began to run. If the statute of limitations began to run on August 15, 2002, a finding that is not supported by the terms of the agreement between the parties or *Employers Mut Cas Co*, 190 Mich App at 63, then the cross-complaint, which was filed on September 26, 2008, was time-barred. MCL 600.5807(8); see also MCL 600.5827. However, the terms of the agreement between the City and Anthony indicate that acceptance occurred when the entire project was completed and accepted in March 2004. Arguably, the cause of action accrued at that time. *Employers Mut Cas Co*, 190 Mich App at 63. If the breach of contract action accrued in March 2004, the cross-complaint was timely. MCL 600.5807(8). This issue must be addressed and decided in the trial court.

A question of fact exists as to whether the City's cross-complaint was time-barred under MCL 600.5807(1), but the City's prospects for recovering damages for breach of contract seem problematic, at least as the cross-claim is currently pled. Under Count I, breach of contract, the City seeks damages "in an amount equal to the recovery by the Plaintiff, if any, plus the full amounts of any costs and attorney fees incurred by the City of Warren in defense of this action." Plaintiff alleged that his injuries occurred due to Anthony's negligence in performing work on the sidewalk. The City settled with plaintiff for the sum of $135,000. Plaintiff's damages resulted from tortious activity. Under the express terms of our Supreme Court's remand order, the City cannot seek indemnity "for damages sustained as a result of tortious activity". Thus, the damages sought in Count I of the cross-claim are not recoverable by the City. Under Count II, indemnity, the City seeks a judgment declaring that Anthony is obligated to defend and indemnify the City, to pay any judgment obtained by plaintiff against the City, to reimburse the City for all costs and attorney fees, and awarding other appropriate relief. The City cannot be indemnified for the amount of the settlement with plaintiff. The City has not sought indemnity for other damages resulting from Anthony's alleged breach of contract, such as repair and replacement costs. The City could seek to amend its cross-complaint, MCR 2.118(A)(2), if it has incurred the type of damages that are recoverable.

The statute of repose does not apply to the breach of contract claim raised in the City's cross-complaint. *Miller-Davis*, 489 Mich at 358. Therefore, we need not address the City's arguments regarding application of the statute of repose to the facts of this case.

Reversed and remanded for further proceedings in accordance with this opinion. We do not retain jurisdiction. As the prevailing party, the City of Warren may tax costs pursuant to MCR 7.219.

/s/ Henry William Saad
/s/ Kathleen Jansen
/s/ Kirsten Frank Kelly